

The Honorable Fred Van Sickle

STEVE W. BERMAN, WSBA No. 12536
ERIN K. FLORY, WSBA No. 16631
HAGENS BERMAN SOBOL SHAPIRO LLP
1918 Eighth Avenue, Suite 3300
Seattle, WA 98101
(206) 623-7292

BRADLEY B. JONES, WSBA No. 17197
KENNETH G. KIEFFER, WSBA No. 10850
F. MIKE SHAFFER, WSBA No. 18669
GORDON THOMAS HONEYWELL
MALANCA PETERSON & DAHEIM LLP
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98402
(253) 620-6500

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

In re METROPOLITAN SECURITIES
LITIGATION

No. CV-04-0025-FVS

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT BETWEEN THE
CLASS AND DEFENDANT
ERNST & YOUNG LLP

Hearing Date: March 26, 2010
Time: 6:30 p.m.

I. INTRODUCTION

In this motion, the Class hereby moves for preliminary approval of the settlement of its claims against Defendant Ernst & Young ("E&Y"). Class Counsel has engaged in negotiations with E&Y for months, resulting in a

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1 settlement for \$14.25 million. Class Counsel strongly believes that this settlement
2 is in the best interests of the Class as a whole. Class Counsel therefore requests
3 that the Court approve the settlement.

4 In connection with that approval, as explained below, the Class also requests
5 that the Court (1) delay consideration of the form and manner of notice until trial
6 or other resolution of the claims against the other Defendants, and (2) in the
7 meantime, provide E&Y the peace it has settled for by bifurcating the Class claims
8 against E&Y and preliminarily barring claims against E&Y pending consideration
9 of whether to finally approve the settlement. For the reasons outlined below, the
10 Class believes that these are necessary steps in approving this settlement given the
11 present circumstances.

12 The Class does note that, given the fact that they reached an agreement in
13 principle with PricewaterhouseCoopers (“PwC”) on February 22, 2010, some of
14 the provisions of the E&Y settlement and the proposed orders submitted in
15 connection with this motion will become moot if the Court approves the PwC
16 settlement and the Class reaches agreement with the remaining individual
17 Defendants. However, given that the PwC settlement is not final, that there is as of
18 this filing no agreement with the remaining Defendants, that the potentially moot
19 provisions regarding allocation of fault are part of the Settlement Agreement, and
20 that the Class had agreed to submit approval papers to the Court no later than
21 February 23, 2010, the Class requests entry of the proposed orders as agreed to by
22 the Class and E&Y. The Class additionally notes that the proposed orders are
23 nearly identical to the orders recently entered by the Court in connection with the
24 Roth settlement.

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II. FACTS

A. The Negotiation of the Settlement Agreement.

The Settlement Agreement is the product of several months' worth of negotiations between E&Y and the Class. E&Y and the Class first participated in a joint mediation session between Roth, PwC, and E&Y before Ret. Judge Layn Phillips in June 2009. Declaration of Tyler Weaver in Support of Motion for Preliminary Approval of Settlement ("Weaver Decl."), ¶ 4. E&Y and the Class did not reach agreement during that mediation but in late January 2010, following the Court's ruling on the cross-motions for summary judgment on issues related to loss causation, resumed discussions. *Id.* After a second formal mediation on February 8, 2010, the Class and E&Y reached final agreement on February 22, 2010. *Id.*

B. The Amount of the Settlement and the Terms and Conditions of Payment

The essential term of the Settlement Agreement is that in return for the payment of \$14.25 million, the Class will release all claims against E&Y.

The Settlement Agreement is expressly conditioned on the entry of a number of orders by this Court:

- An order preliminarily approving the Settlement and enjoining the assertion of claims against E&Y by other defendants or third parties.
- Entry of a bar order upon final approval of the Settlement.
- An order bifurcating claims against E&Y.
- Notice to the Class following trial of the Class' remaining claims.
- An order of final approval from the Court.

In this motion, Plaintiffs seek only preliminary approval, bifurcation of claims against E&Y, and a stay on claims against E&Y pending consideration of

1 whether the Court should enter a final approval order and a bar order in connection
2 with final approval of the Settlement.

3 **C. Claims Released by the Class and by E&Y.**

4 The Settlement Agreement provides that the Class will release E&Y, and its
5 officers and agents, from all known and unknown claims of any nature that the
6 Class has against them arising out of the subject matter of this class action.
7 Agreement, ¶ IV.A.

8 **D. Bar on Claims against E&Y.**

9 By entering into the Settlement Agreement, E&Y made clear to the Class
10 that its objective was to buy peace not only from the claims of Class but also from
11 claims of other defendants and any claims that might be brought against E&Y by
12 third parties. Accordingly, E&Y requested a provision similar to a provision in the
13 recent Roth settlement, to which the Class agreed, obligating the Class to request
14 the entry of a Court order barring any such third-party claims against it, and also
15 barring claims of contribution by the defendants who have not settled.

16 The Class requests that the Court enter as part of its preliminary approval an
17 order that temporarily bars the remaining defendants in this case from asserting
18 claims against E&Y, pending consideration of final approval. The Class believes
19 that such an order would be appropriate pending the resolution this litigation and
20 the consideration of final approval, in order to avoid unnecessary litigation prior to
21 and during trial, before the parties know whether (and to what extent) any other
22 defendants actually have claims to assert against E&Y.

23 When the Class comes before this Court for an order finally approving the
24 settlement, the Class will seek entry of a permanent bar order pursuant to Ninth
25 Circuit law, including *Franklin v. Kaypro*, 884 F.2d 1222 (9th Cir. 1989).
26 Agreement, ¶ VI.B. *See also* Ex. C to Agreement. However, the Court does not

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1 now, on this motion, need to consider whether a final bar order would be
2 appropriate.

3 **E. Bifurcation of Claims Pending Trial.**

4 As a condition to settlement, E&Y also demanded, and the Class agreed, that
5 the Settlement should be conditioned on E&Y's ability to avoid having to try the
6 claims against it after having (presumably) a settlement that the Court has
7 preliminarily approved. The timing and nature of the Settlement makes it
8 essentially impossible – prior to trial – to secure preliminary approval of the
9 Settlement, provide notice to the Class, allow sufficient time for the Class to decide
10 whether to object to the Settlement, and allow the Court time to consider whether
11 to finally approve the Settlement. Therefore, in order for E&Y to receive peace
12 under the Settlement and not be required to defend claims that it has settled, the
13 Class requests that the Court enter an order bifurcating the Class' claims against
14 E&Y pending consideration of final approval.

15 **F. The Duty to Cooperate**

16 In addition, E&Y has agreed to reasonably cooperate with counsel for the
17 Class to obtain final approval of this settlement, and has also agreed to in pursuit of
18 their claims against the remaining defendants by producing E&Y auditor Jack
19 Behrens at trial, subject to E&Y's exercise of any legal privileges. Agreement, ¶
20 IX.A.

21 **G. Notice to the Class.**

22 In more conventional circumstances, the Class would move for approval of a
23 form and manner of notice to the Class in connection with this motion for
24 preliminary approval. However, because the Settlement only resolves claims
25 against one defendant, and does so shortly before potential of the claims against
26 remaining defendants, the Class hereby requests that the Court preliminarily

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1 approve the Settlement but leave the issue of the form and manner of notice to the
 2 Class until the earlier of (i) final resolution of claims against the remaining
 3 Defendants, or (ii) June 15, 2010, subject to the parties' agreement to a later date.
 4 Agreement, ¶ V.B. It is highly likely, given the recent agreement with PwC and
 5 the possible resolution of the entire case if Plaintiffs are able to resolve their claims
 6 against the remaining defendants, that there will be another event requiring notice
 7 to the Class. It will be far more efficient, and far less confusing, to have a single
 8 notice that informs the Class of the full scope of those events.

9 **III. ARGUMENT**

10 **A. Standards for Preliminary Approval.**

11 The dismissal or compromise of any class action requires the Court's
 12 approval. Fed. R. Civ. P. 23(e). There are three steps to be taken by the Court in
 13 considering approval of a proposed class-action settlement: (1) the Court must
 14 preliminarily approve the proposed settlement; (2) members of the class must be
 15 given notice of the proposed settlement; and (3) a final hearing must be held, after
 16 which the Court must decide whether the proposed settlement is fair, reasonable
 17 and adequate. *See* Manual For Complex Litigation (Fourth) § 21.632, at 320-21
 18 (2004).

19 The primary question raised by a request for preliminary approval is whether
 20 the proposed settlement is "within the range of possible approval." *Id.*, § 21.632 at
 21 321. Preliminary approval does not require the Court to answer the ultimate
 22 question of whether a proposed settlement is fair, reasonable and adequate. Rather,
 23 that decision is made only at the final approval stage, after notice of the settlement
 24 has been given to the members of the Class and they have had an opportunity to
 25 voice their view of the settlements. Preliminary approval is merely the prerequisite
 26 to giving notice so that members of a class have "a full and fair opportunity to

1 consider the proposed [settlement] and develop a response.” *Williams v. Vukavich*,
 2 720 F.2d 909, 921 (6th Cr. 1983).

3 Courts have consistently noted that the standard for preliminary approval is
 4 less rigorous than the analysis at final approval. Preliminary approval is
 5 appropriate so long as the proposed settlement falls “within the range of possible
 6 judicial approval.” A. Conte & H.B. Newberg, *Newberg on Class Actions*, § 11.25
 7 (4th ed. 2002), quoting *Manual for Complex Litigation Third* § 30.41 (1997). The
 8 purpose of the preliminary approval process is for the Court to ascertain whether
 9 reason exists to proceed by notifying the class members of the settlement and to
 10 hold a fairness hearing. *See, e.g., Armstrong v. Board of School Directors*, 616
 11 F.2d 305, 314 (7th Cir. 1980). In considering whether to grant a motion for
 12 preliminary approval of a proposed settlement agreement, the court utilizes a
 13 “threshold inquiry” intended merely to realize conspicuous defects. *See, e.g., In re*
 14 *Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 337-38 (N.D. Ohio 2001).

15 Unless the Court’s initial examination “disclose[s] grounds to doubt its
 16 fairness or other obvious deficiencies,” the Court should order that notice of a
 17 formal fairness hearing be given to settlement class members under Rule 23(e).
 18 *See Manual For Complex Litigation (Fourth)*, § 21.633 at 321-22.

19 Moreover, the opinion of experienced counsel supporting the settlement is
 20 entitled to considerable weight. *See id.* Here, experienced counsel for the Class
 21 has concluded that the proposed partial settlement is in the best interests of the
 22 Class, as explained below. The Settlement merits preliminary approval.

23 **1. The Settlement Is the Result of Non-Collusive Negotiations.**

24 The proposed Settlement is the result of serious, informed, non-collusive
 25 negotiations. As described above and in the Weaver Declaration, Class Counsel
 26 and counsel for E&Y participated in a formal mediation in June 2009, followed by

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1 a second formal mediation on February 8, 2010. The parties conducted the
2 negotiations almost exclusively through Ret. Judge Layn Phillips.

3 **2. The Settlement Falls Within the Range of Possible Approval.**

4 Class Counsel, with the guidance of the Lead Plaintiffs, exercised their
5 judgment based on extensive knowledge of the facts of the case and the legal
6 issues facing the Class, as well as judgments about the strengths and weaknesses of
7 the case. After an extensive analysis, Class Counsel concluded that the terms of
8 the Settlement Agreement are fair, just, and adequate. *See Weaver Decl.*, ¶ 6.

9 Class Counsel is, of course, extremely well-versed in the facts and legal
10 issues to be tried in this case, having undergone years of discovery, including
11 reviewing hundreds of thousands of pages of discovery produced by parties in this
12 case and related cases, taking or reviewing hundreds of depositions and trial
13 transcripts in this case and related cases, and engaging in extensive expert
14 discovery. Class Counsel's recommendation of the Settlement also takes into
15 account all of the Court's recent rulings, including the *Daubert* motions decided
16 after this settlement was reached in principle.

17 **3. Class Counsel Does Not Seek an Award of Fees or Costs at This**
18 **Time**

19 Class Counsel does not now move for a payment of fees or costs under the
20 Settlement. Class Counsel will file the appropriate motion for determination of
21 fees and costs in connection with final approval of the Settlement. The Settlement
22 is not conditioned on the Court's approval of an award of a particular or minimum
23 amount of fees and costs.

24 **4. The Court Should Bifurcate Claims against E&Y and**
25 **Preliminarily Bar Claims against E&Y Pending Final Approval**

26 The Class also requests that the Court enter two related orders that are
necessary to protect E&Y and effectuate the Settlement. The reasons underlying

1 this request are that the Settlement does not resolve all claims against all
2 defendants in this case, trial is less than one month away, and there is no chance
3 that the Settlement will (or could) be finally approved prior to any trial given the
4 time necessary for notice and comment from Class members. In these
5 circumstances, it is reasonable for E&Y to request, and the Court to grant, certain
6 protections that would allow the parties to litigate the Class claims in the event the
7 Settlement is not finally approved, yet not require it to participate as a defendant in
8 any trial.

9 To that end, the Settlement is conditioned in part on the entry of an order
10 bifurcating the Class claims against E&Y pending consideration of final approval.
11 This order, as set out in Exhibit B to the Agreement, severs the Class claims
12 against E&Y from the claims against the other defendants. The result may be a
13 trial on those claims against other parties, in which E&Y does not participate as a
14 defendant. This protects E&Y yet does not prejudice any other defendant, as at
15 any trial the other defendants will have the opportunity to defend their claims and
16 attempt, should they choose, to argue that E&Y is liable for a portion of the
17 damages.

18 Additionally, the Settlement is conditioned on entry of an order that
19 preliminarily bars the other Defendants from stating claims against E&Y prior to
20 the Court's consideration of final approval of the Settlement and a permanent bar
21 order. This is also reasonable in the circumstances, given that the other defendants
22 will not even know, until after any trial, whether they have a claim against E&Y,
23 much less how much that claim might be worth. In fact, as of the filing of this
24 motion, it appears likely that no defendant will have a claim for contribution
25 against E&Y.
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B. It Is Appropriate to Propose and Distribute Class Notice After Trial

Rule 23(e)(1) requires, in the event of any proposed settlement or compromise of a class action, that the class that would be bound by the settlement receive “direct notice in a reasonable manner” before the settlement can be finally approved. Typically, notice follows close on the heels of preliminary approval and is part of the preliminary approval process. However, Class Counsel believe that the timing of this partial settlement before trial, and in the midst of possible resolution of the entire matter, it is in the best interests of the Class to delay notice until after trial or the resolution of all remaining claims against the remaining Defendants.

IV. CONCLUSION

For the foregoing reasons, respectfully request that the Court enter the Proposed Orders, which will provide: (i) preliminary approval of the settlement; (ii) bifurcation of the Class’s claims against E&Y; and (iii) an order barring the remaining defendants from asserting claims against E&Y pending the outcome of the trial and final approval of the Settlement, whichever is later.

Dated this 23rd day of February, 2010.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By s/Bradley B. Jones
Bradley B. Jones, WSBA No. 17197
Kenneth G. Kieffer, WSBA No. 10850
Attorneys for Plaintiffs

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HAGENS BERMAN SOBOL SHAPIRO LLP

By s/Tyler S. Weaver

Steve W. Berman, WSBA No. 12536

Jeniphr A.E. Breckenridge, WSBA #21410

Tyler S. Weaver, WSBA #29413

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party via email on February 23, 2010, to the following:

George S. Azadian Azadian@strook.com

James K Barbee at jim@golbeckroth.com

Philip S Beck at anne.doyle@bartlit-beck.com; susan.dandrea@bartlit-beck.com

Ronald L Berenstein at rberenstein@perkinscoie.com; jstarr@perkinscoie.com

Steve W Berman at steve@hbsslaw.com; heatherw@hbsslaw.com

Brian D Buckley at bbuckley@fenwick.com

Elizabeth J Cabraser at ecabraser@lchb.com; ewalser@lchb.com

Kelly P Corr at kcorr@corrchronin.com; dpatterson@corrchronin.com; reception@corrchronin.com

James P. Cusick at jcusick@kslaw.com

Pearl Del Rosario at pdelrosario@orrick.com; valdeman@orrick.com

Christopher G Emch at emchc@foster.com; pateb@foster.com

Timothy L Filer at filet@foster.com; howej@foster.com

Steven Fogg at sfogg@corrchronin.com; ivandiver@corrchronin.com

E Joseph Giometti at jgiometti@orrick.com; gjohnson@orrick.com

Peter Jennings Grabicki at pjg@randanco.com; scc@randanco.com; nlg@randanco.com

Gary I Grenley at ggrenley@grebb.com

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1 Richard M Heimann at rheimann@lchb.com; lsimms@lchb.com
2 Kenneth P Herzinger at kherzinger@orrick.com
3 David D Hoff at dhoff@tousley.com; btaylor@tousley.com
4 Tarek Ismail at tarek.ismail@bartlit-beck.com; anne.doyle@bartlit-beck.com
5 Stephen M Knaster at sknaster@orrick.com; vadelman@orrick.com
6 James B. King at jking@ecl-law.com
7 Christopher D Landgraff at chris.landgraff@barlit-beck.com
8 Mary D Manesis at mmanesis@stroock.com; cdusi@stroock.com
9 J Scott McBride at scott.mcbride@barlit-beck.com
10 James P McNeill, III at mcnej@foster.com
11 Michael L Merriman at michael.merriman@barlit-beck.com
12 Jeffrey S Miller at milje@foster.com; kellie@foster.com; snydd@foster.com;
13 hickc@foster.com
14 John Degnan Munding at munding@crumb-munding.com; brittany@crumb-munding.com
15 Robert J Nelson at rnelson@lchb.com
16 Kevin Daniel O'Rourke at korourke@southwellorourke.com
17 Carl J Oreskovich at carl@ettermcmahon.com; roni@ettermcmahon.com
18 Erin K. Flory at erin@hbsslaw.com; carrie@hbsslaw.com
19 Andrew K Polovin at andrew.polovin@bartlit-beck.com;
20 anne.doyle@bartlit-beck.com
21 Terry J Price at tprice@rmalw.com
22 Mark Roth at mark@golbeckroth.com
23
24
25
26

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1 Stephen M Rummage at steверummage@dwt.com; jeannecadley@dwt.com

2 Darrell W Scott at scottgroup@mac.com; ssimatos@mac.com

3 M Todd Scott at tscott@orrick.com; jwatts@orrick.com; tmanolova@orrick.com

4 James M Shaker at shaker@ryanlaw.com; callahan@ryanlaw.com

5 Daniel F Shea at dfshea@hhlaw.com;

6 Kim D Stephens at kstephens@tousley.com; efile@tousley.com;
7 jalbertson@tousley.com

8 Julia B Strickland at jstrickland@stroock.com; tmitchell@stroock.com;
9 lacalendar@stroock.com

10 Earl M Sutherland at esutherland@rmlaw.com; lfisher@rmlaw.com

11 Beth E Terrell at bterrell@tousley.com; bkinsey@tousley.com; efile@tousley.com

12 Paul H Trincherro at ptrincherro@grebb.com

13 Michael C Tu at mtu@orrick.com; sspencer@orrick.com

14 Robert P Varian at rvarian@orrick.com

15 Fabrice Vincent at fvincent@lchb.com; dclevenger@lchb.com

16 Joshua Watts at jwatts@orrick.com; gjohnson@orrick.com

17 Christine Marie Weaver at cw@cweaverlaw.com

18 Diana L. Weiss at dlweiss@kslaw.com

19 Leslie Richard Weatherhead at lwhlibertas@aol.com

20 Charles S Wright at charleswright@dwt.com; terriray@dwt.com

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HAGENS BERMAN SOBOL SHAPIRO LLP

By s/ Tyler S. Weaver

Tyler S. Weaver, WSBA No. 29413

1918 8th Avenue, Suite 3300

Seattle, WA 98101

Telephone: (206) 623-7292

Facsimile: (206) 623-0594

Co-Lead Counsel for Plaintiffs

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